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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELMER T. SHERMAN,

Defendant and Appellant.

B286909

(Los Angeles County  
Super. Ct. No. LA077501)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Affirmed.

Law Office of G. Martin Velez, G. Martin Velez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

## **I. INTRODUCTION**

Defendant and appellant Elmer Sherman pleaded no contest to possessing a controlled substance in violation of Health and Safety Code section 11377, subdivision (a) and admitted serving five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced defendant to eight years in county jail, suspended execution of the sentence, and placed defendant on supervised probation for five years.

The trial court subsequently found defendant to be in violation of probation. On appeal, defendant contends his right to due process was violated because the trial court found him in violation of probation for conduct about which he was not provided written notice; the trial court's admission of a supplemental probation report violated his right to due process; the trial court abused its discretion when it permitted hearsay testimony; and the cumulative effect of the errors requires reversal. We affirm.

## **II. BACKGROUND**

On November 18, 2015, the Probation Department filed a report alleging that on October 9, 2015, defendant failed to report to the probation officer as instructed and had failed to provide a valid address to or contact the probation officer.

On November 18, 2015, the trial court issued a bench warrant for defendant's arrest, for violating probation by failing to report.

On November 1, 2017, the District Attorney's Office dismissed firearms charges against defendant and elected to proceed by way of probation violation.

On November 13, 2017, the trial court commenced a contested probation violation hearing. Los Angeles Police Department Officer Geoffrey Carlson testified that at about 7:50 a.m. on December 18, 2016, he responded to a call of shots fired at a public storage facility in the area of Vanowen and Canoga. There, Officer Carlson saw a 2004 Nissan Frontier pickup truck. Defendant was in the driver's seat and Evangelina Rodriguez was in the front passenger seat. After defendant and Rodriguez were removed from the truck, a semiautomatic firearm was recovered from beneath the front passenger seat. Defendant was detained.

Officer Myra Gonzalez testified that she filled out a field identification card for defendant. She asked defendant his name. Defendant provided his brother's name—Jorge Sherman.

Julie Lopez testified that defendant lived with her at 7056 1/2 Eton Avenue in Canoga Park from November 2015 through February 2016. From February 2016 to December 18, 2016, defendant mostly stayed at an apartment on Millwood Street in Canoga Park, but sometimes stayed at Lopez's residence.

On July 28, 2014, defendant met with deputy probation officer Andre Aleksanian at the A.B. 109 probation office in Pacoima for an orientation on defendant's probation.<sup>1</sup> Aleksanian testified that he read with defendant the conditions of

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<sup>1</sup> In addition to his formal probation in this case, defendant was on A.B. 109 probation in case number PB012590. Aleksanian supervised both probations.

probation, which included the condition that defendant keep Aleksanian advised of defendant's residence and work and home telephone numbers at all times. Defendant said he would be living with his brother, Jorge.

Beginning on September 30, 2015, deputy probation officer Jose Ochoa supervised defendant's A.B. 109 and formal probations. On that date, defendant appeared at the probation office and notified Ochoa that he had walked away from the Socorro Cri-Help residential treatment program—a part of his A.B. 109 probation—on September 25, 2015.

Ochoa testified that he scheduled an appointment for defendant to return at 9:30 a.m. on October 5, 2015, to be evaluated for placement in another treatment program. Defendant appeared too late, and his appointment was rescheduled for October 9, 2015. Defendant did not appear for that appointment, and never again appeared at the probation office. After October 9, 2015, defendant did not make Ochoa aware of any address at which defendant lived.

Deputy probation officer John Roque prepared a supplemental probation report<sup>2</sup> in this case using the probation department's Adult Probation Systems and Justice Interface Controller. All of his testimony was based on his review of records he obtained through the probation department. Roque testified that defendant never provided 7056 1/2 Eton Avenue in Canoga Park or an address on Millwood Street in Canoga Park as

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<sup>2</sup> The trial court ordered the probation department to prepare a supplemental report concerning defendant's reporting history since being placed on probation. The report was admitted into evidence over defendant's testimonial hearsay objection.

his residence address. The trial court overruled defendant's objection that Roque's testimony about the contents of the documents was testimonial hearsay.

Roque further testified that there was no evidence in the documents to which he had access that showed defendant reported to the probation department after October 5, 2015. Defendant's next contact with the probation department was December 8, 2016, when he was taken into custody.<sup>3</sup> Defendant again objected to Roque's testimony on the ground that it was testimonial hearsay and the trial court again overruled the objection.

In his defense, defendant testified that 7056 1/2 Eton Avenue was never his address. He did not know the firearm was in the truck he was driving on December 18, 2016. He admitted he told police officers his name was Jorge Sherman. He further admitted that he knew he had to report to a probation officer and that he had not reported for over a year prior to his December 2016 arrest.

### III. DISCUSSION

#### A. *The Trial Court Did Not Find That Defendant Violated His Probation by Providing a False Name to Officer Gonzalez*

Defendant contends his right to due process was violated because he was not given written notice alleging he violated his probation by giving Officer Gonzalez a false name. He further

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<sup>3</sup> Roque appears to have misspoken when he testified that defendant was taken into custody on December 8. Defendant was taken into custody on December 18, 2016.

contends we may reach this issue on appeal because defense counsel's failure to object to the lack of notice in the trial court was ineffective assistance of counsel.

A trial court may revoke an order of probation when the preponderance of the evidence shows that a defendant has not complied with the terms of his probation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443; *People v. Urke* (2011) 197 Cal.App.4th 766, 772.) Among the procedural due process rights to which a defendant is entitled in connection with a probation revocation hearing is the right to receive written notice of the claimed probation violations. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1153.) A defendant forfeits a due process claim based on the lack of notice by failing to object in the trial court. (See *People v. Abilez* (2007) 41 Cal.4th 472, 521, fn. 12.)

Even if defendant did not forfeit this claim by failing to object to the lack of written notice in the trial court, the claim fails as it is based on the false premise that the trial court found him in violation of probation because he gave Officer Gonzalez a false name. In finding defendant in violation of his probation, the trial court stated, "There's no question in my mind that when the defendant is placed on probation way back on July 24th, 2014, and told, 'You are to keep the probation officer advised of your home and work addresses and telephone numbers at all times,' for the next five years, he didn't do that. He was living at multiple residences unknown to the probation department. That's one violation of probation."

The trial court further found that defendant violated his probation by failing to report to probation for over one year. It stated, "So he didn't report. He didn't keep probation advised of his addresses and phone numbers. Then the false name to the

police officer, to me, only shows he was totally aware that there was probably a warrant out for him because he hadn't reported for so many months, and that's why he gave his brother's name to the police officer. It was not because of the gun, because the gun had not yet been discovered, but because he knew he was a fugitive at large."

The trial court found that defendant violated his probation by failing to keep his probation officer apprised of his current home and work addresses and telephone numbers and by failing to report to probation for over one year. The trial court did not find that defendant violated his probation by giving Officer Gonzalez a false name. Instead, the trial court referred to defendant's provision of a false name as support for its conclusion that defendant violated his probation by failing to report. It concluded that defendant gave a false name to avoid arrest on a warrant that likely would have issued due to his failure to report to probation.

#### *B. Roque's Supplemental Probation Report and Testimony*

Defendant contends the admission of Roque's supplemental probation report violated defendant's right to due process. He contends the report was inadmissible either because it was testimonial hearsay or because it was non-testimonial hearsay that was not subject to the business records exception to the hearsay rule.

Defendant also challenges the admission of Roque's testimony. He contends the trial court abused its discretion in admitting Roque's testimony because it was hearsay; the prosecution failed to lay a proper foundation for the admission of

Roque's testimony about the report under the business records exception; and, to the extent Roque's testimony was based on information contained in the supplemental report, that testimony violated his right to confront and cross-examine witnesses.

Even if the trial court erred in admitting Roque's supplemental probation report and testimony, any such errors were harmless. We review the erroneous admission of testimonial hearsay for prejudice under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Sanchez* (2016) 63 Cal.4th 665, 670-671 [considering whether the admission of the testimonial hearsay evidence was harmless beyond a reasonable doubt].) We review the erroneous admission of nontestimonial hearsay for prejudice under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Harris* (2005) 37 Cal.4th 310, 336 [considering whether it was reasonably probable the defendant would have received a more favorable result if the nontestimonial hearsay evidence had been excluded].)

Apart from Roque's supplemental probation report and testimony, there was overwhelming evidence that defendant failed to report to probation or to keep the probation department advised of his residence and work and telephone numbers at all times. Lopez testified that from November 2015, to December 2016, defendant lived at two different addresses in Canoga Park. Ochoa testified that after defendant appeared in the Pacoima office on October 5, 2015, he never appeared again. He further testified that after October 9, 2015, defendant did not provide him with defendant's residence address. In his testimony, defendant admitted that he knew he was required to



report to probation and that he had not reported for over a year prior to his December 2016 arrest.

C. *There Was No Cumulative Prejudicial Effect Requiring Reversal*

Defendant seems to contend the cumulative prejudicial effect of the claimed errors warrants reversal. “[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 844.) We conclude there is no cumulative prejudicial effect requiring reversal. (*People v. Melendez* (2016) 2 Cal.5th 1, 33.)

#### IV. DISPOSITION

The judgment is affirmed.

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KIM, J.

We concur:

MOOR, Acting P. J.

JASKOL, J. \*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.